(23,948)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 797.

J. W. CAIN, PLAINTIFF IN ERROR,

vs.

COMMERCIAL PUBLISHING COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

INDEX.

Judd & Detweiler (Inc.), Printers, Washington, D. C., December 5, 1913.

1 In the District Court of the United States, Southern District of Mississippi, Jackson Division.

Pleas and proceedings had and done at a regular term of the District Court of the United States for the Jackson Division of the Southern District of Mississippi, begun and held in the court room thereof, in the city of Jackson, Mississippi, on the 3rd day of November, A. D. 1913, that being the regular time and place designated by law for the holding of said court.

Were present and presiding the Honorable H. C. Niles, Judge, herein solely presiding; Hon. R. C. Lee, United States Attorney; Hon. W. O. Ligon, United States Marshal, and L. B. Moseley, Clerk.

Among the proceedings had and done were the following, to-wit:

2 Pleas and proceedings had and done at a regular term of the Circuit Court in and for the First District of Hinds County, begun and held at the court house thereof, in the city of Jackson, on the Third Monday of September, 1913, being the 15th day of September, 1913.

Present: Honorable W. A. Henry, Judge of the Seventh Judicial District of the state of Mississippi and presiding judge of said court; E. S. Middleton, Sheriff; E. D. Fondren, Clerk; C. W. Robinson, Stenographer.

3 In the Circuit Court of Hinds County, First District, State of Mississippi.

No. —.

J. W. CAIN
vs.
THE COMMERCIAL PUBLISHING COMPANY.

Declaration.

Now comes J. W. Cain, a resident and citizen of the city of Jackson, County of Hinds, State of Mississippi and complains in an action of trespass of the Commercial Publishing Company, a corporation, having an agent for the service of process in said County of Hinds, First District, in the person of Earl Williams, and for his cause of action states: That whereas the said J. W. Cain now is a good true and upright citizen of the state of Mississippi, and as such has always conducted himself and until the committing of the several grievances by the said Commercial Publishing Company, as hereinafter mentioned, was always so reputed, esteemed and accepted by his neighbors and other good citizens to whom he was in anywise

known to be a person of good name, fame and credit upon August 7th, 1913 and for many years prior thereto. And whereas said plaintiff has not been guilty or be- regarded as guilty of, or until the committing of the said wrongs by the said Commercial Publishing Company as hereinafter set forth been even suspected of being guilty of being "a well known rascal" or any other such crime. By means of which premises, said plaintiff before the committing of said wrongs had deservedly obtained the good opinion and credit of all of his neighbors and other good and worthy citizens of the state, to whom he was in anywise known. Yet the said Commercial Publishing Company, well knowing the premises and greatly envying the happy state and condition of plaintiff and contriving and wickedly and maliciously intending to injure the said plaintiff in his good name, fame and credit and to bring him into public scandal, infamy and disgrace with and among all his neighbors and among all persons among whom said Commercial Appeal, so published as hereinafter set forth, circulated and to cause it to be suspected and believed among said persons that the said plaintiff was a well known rascal and to vex, oppress and ruin said plaintiff heretofore upon the 7th day of August 1913 in the County of Hinds, First District and all other places where the said Commercial Appeal circulates and is read did compose and publish and cause and procure to be published of an- concerning the said plaintiff, J. W. Cain, a certain false, scandalous, malicious and defamatory libel, containing among other things the false, scandalous, defamatory following of and concerning the said plaintiff, said J. W. Cain "he boldy stated

4 that when they *they* saw that they were in trouble that Turley, R. B. Hamilton, Hamilton Buck, E. W. Weathersby, and Jack Cain who was a well known rascal had met and planned this method of escape," that is to say, that -he said Jack Cain, meaning plaintiff, J. W. Cain, was a well known rascal. That the said Commercial Publishing Company published the said paper called the Commercial Appeal, in the city of Memphis, State of Tennessee, but that the said Commercial Appeal has a large circulation throughout the state of Mississippi, and all adjoining states and among foreign states and also in foreign countries. That the said publication is in good standing and the false and scandalous charges made therein, wholly false and baseless against the plaintiff by reason of the wide circulation of the said newspaper were given the very widest publication especially so in that the said words were published upon the most prominent portion of the said newspaper upon the very front page thereof—a copy of the same being annexed hereto and made a part — as fully as if copies herein.

That by the means of the committing of the said offense by the said Commercial Publishing Company which published and circulated the said newspaper, called the Commercial Appeal, said plaintiff has been and is greatly injured in his good name, fame and credit, and brought into public scandal, infamy and disgrace with and among all people among whom said Commercial Appeal was circulated by the said defendant and that by reason thereof he has been greatly damaged and that he is entitled to have, demand and

recover of and from the said Commercial Publishing Company the sum of Ten Thousand Dollars actual damages and Ten Thousand dollars punitive damages, for all of which he hereby *dues* and demands judgment.

GREEN & GREEN, *Attorneys.*

Filed Aug. 7th, 1913. E. D. Fondren, Clerk, By J. P. Cadwallader, D. C.

5 *Circuit Court Summons.*

THE STATE OF MISSISSIPPI:

To the Sheriff of Hinds County, Greeting:

We command you hereby that you summon Commercial Publishing Company if to be found in your county, so that it be before the Circuit Court to be holden in and for the First District of said County at the courthouse thereof, in the city of Jackson on the 3rd Monday of September, 1913 to answer the declaration of J. W. Cain, suit for damages in the sum of $20,000.00 against the said defendant now on file in the clerk's office of said court. And have you then and there this summons.

The amount actually demanded in this suit is the sum stated in said declaration and lawful interest and costs.

Judgment will be demanded at return term. Issued the 7th day of August, 1913.

GREEN & GREEN,
Attorneys for Plaintiff.

Declaration filed when summons issued.

E. D. FONDREN, *Clerk,*
J. P. CADWALLADER, *D. C.*

The following endorsement appears on the back of this summons.

Executed personally on the Commercial Publishing Company by delivering a true copy of the within writ to E. K. Williams, its agent at Jackson, Miss. This 8th day of August, 1913.

E. S. MIDDLETON, *Sheriff,*
W. A. SANDEL, *Deputy.*

6 *Circuit Court Summons.*

THE STATE OF MISSISSIPPI:

To the Sheriff of Hinds County, Greeting:

We command you hereby that you summon, The Commercial Publishing Company, if to be found in your county, so that it be before the Circuit Court to be holden in and for the First District of said County at Courthouse thereof, in the city of Jackson on the 3rd Monday of September, 1913 to answer the declaration of J. W. Cain, suit

for damages in the sum of $20,000.00 plaintiff against the said defendant now on file in the clerk's office of said court. And have you then and there this summons.

The amount actualy deman-ed in this suit is the sum stated in said declaration and lawful interest and costs.

Judgment will be demanded at return term. Issued the 30th day of August 1913.

GREEN & GREEN, *P. Q.*

Declaration filed when summons issued.

E. D. FONDREN, *Clerk.*

The following endorsement appears on the back of this summons.

Executed personally on the Commercial Publishing Company by delivering a true copy of the within writ to A. C. Walthall its correspondent at Jackson, Mississippi. This the 1st day of September 1913.

E. S. MIDDLETON, *Sheriff,*
By W. E. SANDEL, *Deputy.*

7 In the Circuit Court in and for the First District of Hinds County, State of Mississippi.

J. W. CAIN, Plaintiff,
vs.
THE COMMERCIAL PUBLISHING CO., Defendant.

Notice of Petition and Bond for Removal.

To J. W. Cain, Plaintiff, and to Green & Green, Attorneys, his counsel:

You are hereby notified that the defendant, the Commercial Publishing Company will file in the above named court on the 15th day of September, 1913 its certain petition and bond for removal of the above entitled cause from the Circuit Court in and for the First District of Hinds County, Mississippi unto the District Court of the United States for the Southern District of the state of Mississippi, Jackson Division thereof, and will then petition said Circuit Court to so remove said cause.

This the 15th day of September, 1913.

THE COMMERCIAL PUBLISHING COMPANY,
By WRIGHT, WARING, MILES & WALKER, *Attorneys.*

Copy received Sept. 15, 1913.

GREEN & GREEN,
Attorneys for Plaintiff.

Filed September 15th, 1913. E. D. Fondren, Clerk.

8 In the Circuit Court in and for the First District of Hinds County, State of Mississippi.

J. W. CAIN, Plaintiff,

vs.

THE COMMERCIAL PUBLISHING COMPANY, Defendant.

Petition for Removal.

Petitioner, the Commercial Publishing Company, appears specially and for no other than the purpose of filing its petition and bond for removal of this cause from the above mentioned court unto the District Court of the United States for the Jackson Division of the Southern District of the state of Mississippi.

Petitioner respectfully shows to this honorable court that it has been sued by the plaintiff herein for damages resulting from an alleged libelous publication; that said controversy is of a civil nature; that the amount in controversy exclusive of interest and costs; exceeds three thousand dollars; that the plaintiff has brought suit against the defendant and claims damages in the sum of Twenty Thousand Dollars; that your petitioner denies that this court has any jurisdiction of this defendant or of the subject matter of this suit, and denies any liability under the allegations made in the declaration.

Petitioner further states that at the time of the commencement of this suit plaintiff was and still is a citizen and resident of the state of Miss., and that at the time of the institution of this suit and now your petitioner, Commercial Publishing Company, was and is a corporation duly chartered under and by virtue of the laws of the state of Tennessee, that this controversy is therefore a controversy arising wholly between citizens of different states; that the time for your petitioner as defendant in this action to answer or plead as required by law of the state of Mississippi or the rule of this court, has not yet expired and your petitioner has not yet appeared therein, and your petitioner now appears only specially and for the sole purpose of requesting the removal of this cause to the said District Court of the United States, and does not waive any objections or exceptions of the jurisdiction.

Your petitioner herewith presents a good and sufficient bond conditioned that it will enter in said District Court of the United States within thirty days from the date of filing of this petition a cer-

9 tified copy of the record in this suit and that it will pay all costs that may be awarded by the said District Court if said District Court shall hold that such suit is wrongfully or improperly removed thereto, and also that it will appear and enter special bail bond in such suit if special bail bond was originally requisite thereto.

Wherefore your petitioner prays that this court proceed no further herein save to direct a transcript of the record for the District Court of the United States as required by law and to accept the bond herein tendered and to direct this cause to be removed to the District

Court of the United States for the Jackson Division of the Southern District of Mississippi. And your petitioner will ever pray.

THE COMMERCIAL PUBLISHING COMPANY,
By WRIGHT, MILES, WARING & WALKER, *Attorneys.*

Filed September 15th, 1913. E. D. Fondren, Clerk.

10 *Affidavit.*

STATE OF TENNESSEE,
County of Shelby:

J. W. Hays, being duly sworn according to law, deposes and says that he is the Secretary of the Commercial Publishing Company, and that he has read the foregoing petition and that the statements therein contained are true to the best of his knowledge, except such matters as are therein stated on information and belief and as to such statements he believes them to be true.

J. W. HAYS.

Subscribed and sworn to before me this the 13th day of September, 1913.

[SEAL.] CHAS. W. GRIFFITH,
Notary Public.

My commission expires Jan. 27, 1917.

Filed Sept. 15, 1913. E. D. Fondren, Clerk.

11 In the Circuit Court in and for the First District of Hinds County, State of Mississippi.

J. W. CAIN, Plaintiff,
vs.
THE COMMERCIAL PUBLISHING CO., Defendant.

Bond.

Know all men by these presents: That we, the Commercial Publishing Company, as principal, and the Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto J. W. Cain, his successors and assigns, in the sum of five hundred dollars, lawful money of the United States of America, for the payment of which, well and truly to be made, we and each of us bind ourselves and each of us our successor- and assigns, jointly and severally by these presents.

The condition of the obligation is such that:

Whereas, the said Commercial Publishing Company has applied by petition to the Circuit Court in and for the First District of Hinds

County, State of Mississippi, for the removal of a certain cause therein pending wherein J. W. Cain, is plaintiff and the Commercial Publishing Company is defendant, to the District Court of the United States for the Jackson Division of the Southern District of Mississippi, *upon* in said petition set forth, and that all further proceedings in said action in said Circuit court be stayed.

Now, therefore, if the Commercial Publishing Company shall enter in said District Court of the United States for the Jackson Division of the Sou. District of Mississippi within thirty days from the filing of said petition for removal a certified copy of the record in such suit and shall pay all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto and also shall appear and enter special bail in such suit if special bail was originally requisite therein, then this obligation to be void, otherwise shall remain in full force and effect.

In witness whereof, the parties hereto have duly executed this instrument as of the 13th day of September, 1913.

THE COMMERCIAL PUBLISHING COMPANY, *Principal.*
FIDELITY & DEPOSIT CO. OF MARYLAND,
By W. J. CRAWFORD, *Pres.*
By J. O. SANDERS, *Att'y in Fact.*
J. C. HOOD, *Ag't.*

Filed Sept. 15, 1913. E. D. Fondren, Clerk.

12 *Clerk's Certificate.*

STATE OF MISSISSIPPI,
Hinds County:

I, E. D. Fondren, Clerk of the Circuit Court in and for the County of Hinds in said State, do hereby certify that the within and foregoing — pages are a true and correct copy of the records in this cause No. 2342 J. W. Cain v. The Commercial Publishing Company as the same remains of record on file in my office at Jackson, Mississippi.

Given under my hand and official seal this the 22nd day of September, 1913.

E. D. FONDREN,
Circuit Clerk.

13 In the District Court of the United States for the Southern District of Mississippi, Jackson Division.

J. W. CAIN
VS.
COMMERCIAL PUBLISHING COMPANY.

Plea to the Jurisdiction.

The Commercial Publishing Company, the above named defendent, specially appearing under protest for the purpose of this plea and for no other says that this court has no jurisdiction of this case, for the following reasons:

1. This cause was removed duly to this court from the Circuit Court in and for the First District of Hinds County, Mississippi, and this court has not acquired jurisdiction of this defendant, because;

(*a*) Defendant is a corporation organized under the laws of the state of Tennessee; it has never taken out a license to do business in the state of Mississippi; and at the time of the alleged service of the writ of summons herein, as set out in the return of the sheriff of Hinds County, Mississippi, the defendant did not have any agent, office or place of business in Hinds County, Mississippi.

(*b*) Neither Earl K. Williams nor A. C. Walthall upon whom service upon defendant was attempted to be had by the sheriff, and to whom a copy of the summons was delivered, was, either at the time of such attempted — or for some time prior thereto, any officer, agent or employé of the said defendant; that neither of said parties was, at the time of the delivery of the summons herein by the sheriff, in charge of defendant's business office, or in charge of its business in the said Hinds County, Mississippi, for the reason that this defendant had, at said time, no business office or any other office in said Hinds County, Mississippi and was not then doing business in the state of Mississippi.

(*c*) Neither Earl K. Williams nor A. C. Walthall, upon — service of summons upon defendant was attempted to be had by the sheriff, and to whom a copy of the summons was delivered, either at the time of the attempted service or at the time of the publication complained of in the complaint herein, an agent of the defendant, nor did either of said parties represent the defendant at either of said times;

(*d*) The clerk of the Circuit Court of Hinds County, State of Mississippi wherein this suit was brought, did not immediately after the issuance of the alleged writ of summons herein, mail a copy
14 of the same to the home office of the corporation, by registered mail, as required by the statutes of Mississippi purporting to cover service of process upon agents of foreign corporations.

2. This defendant has not, by filing any plea or by taking any other action, either in the Circuit Court of Hinds County Mississippi, or in this court, waived the defect in the service of said summons and submitted itself to the jurisdiction or authority of either of said courts.

Wherefore upon consideration of this plea, defendant prays that this case be dismissed and that it go hence without delay and have judgment for all its costs in this behalf laid out and expended.

COMMERCIAL PUBLISHING COMPANY,
By WRIGHT, MILES, WARING & WALKER, *Attorneys.*

Issue in short by consent.
GREEN & GREEN, *P. Q.*

Plea to jurisdiction filed Nov. 5th, 1913.
L. B. MOSELEY, *Clerk.*

15 In the District Court of the United States for the Southern District of Mississippi, Jackson Division.

J. W. CAIN
vs.
THE COMMERCIAL PUBLISHING CO.

Now comes J. W. Cain and for answer unto said alleged plea says that the same is insufficient in law and no answer to said declaration, because

(1) Said plea is directed to the service of process, and not to the declaration, it being essential under the Judicial Code for said plea to be not to the service but to the declaration, said code having abolished in removal causes all questions of the insufficiency of the service.

(2) No right exists to enter a special appearance in the Hinds County Circuit Court under the laws of the state of Mississippi, all appearances, being general and requiring an answer, at the next term of the court, even though said process may have been invalidly served. Under the laws of said state, that question can only be raised by questioning a judgment by default.

(3) Said alleged plea is a mere motion to quash, and cannot be interposed.

(4) Said alleged plea is no plea under the statutes of Mississippi, in that, it neither confesses or avoids the allegations of the declaration, nor traverse- them or any of them.

(5) And for other causes to be assigned at the hearing.

GREEN & GREEN.

We certify that in our opinion the above demurrer is well taken in law and should be sustained, and that it was not taken for purposes of delay.

GREEN & GREEN.

The following appears on the back of this demurrer. Demurrer to plea to the jurisdiction. Filed November 8th, 1913. L. B. Moseley, Clerk.

16 In the District Court of the United States, Southern District of Mississippi, Jackson Division.

J. W. CAIN
vs.
COMMERCIAL PUBLISHING COMPANY.

Now comes J. W. Cain, and respectfully represents that more than thirty days have elapsed since the transcript of this record in the above entitled cause was filed in this court, and moves the court for a judgment by default, and for the issuance of a writ of inquiry.

GREEN & GREEN.

Filed November 14, 1913. L. B. Moseley, Clerk.

17 In the District Court of the United States for the Jackson Division of the Southern District of Mississippi.

6643.

J. W. CAIN
vs.
THE COMMERCIAL PUBLISHING COMPANY.

Order.

This day came on to be heard this cause on the plaintiff's demurrer to the defendants plea to the jurisdiction of the court, and the court having considered the same, and being of the opinion that the demurrer should be overruled, it is therefore ordered and adjudged that said demurrer be and the same is hereby overruled; and thereupon the plaintiff traversed by replication, by issue joined, by consent, said plea to the jurisdiction and a jury being waived, and the court, by consent having heard the evidence of the issue joined, and being of the opinion from the evidence that neither A. C. Walthall nor Earl Williams upon whom the process of summons was served was such agent of the defendant as that service of process would give jurisdiction over the person of the defendant to this court, finds the issue for the defendant; and thereupon, and before judgment entered on said cause, the plaintiff called up and heard his motion filed herein for judgment by default because defendant had not pleaded or demurred to the declaration herein within thirty days after the filing of the copy of the record on removal herein, as required by section 29 of the Judicial Code and the court being of the opinion that defendant was not required to plead or demur to the declaration in this court unless the process of summons in the state court was duly served upon an agent of defendant upon whom service of process was authorized to be made.

It is further ordered that said motion be and the same is hereby overruled. Thereupon the court proceeded to render judgment on

the finding on the plea to the jurisdiction and it is ordered that service of process on the defendant herein be and the same is hereby quashed, and that this suit be dismissed at plaintiff's cost to be taxed, but without prejudice to the right of plaintiffs to sue upon the causes of action set up in the declaration, and leave is granted to plaintiff to prepare and present for signing a bill of exceptions herein to the judge within sixty days from this date.

November 18th, 1913.

H. C. NILES, *Judge.*

The following appears on back of this writ. Order of Court filed Nov. 18th, 1913. L. B. Moseley, clerk, By B. L. Todd, Jr., D. C.

18 In the District Court of the United States for the Southern District of Mississippi, Jackson Division.

6643.

J. W. CAIN
vs.
COMMERCIAL PUBLISHING COMPANY.

Petition for Allowance of Writ of Error from the said District Court on the Question of Jurisdiction.

To the Honorable Judges of said Court:

Your petitioner, J. W. Cain, respectfully represents that there is manifest error committed, to the injury of petitioner, by the judgments pronounced in this case on the 18th day of November, 1913 in and by which judgments this court refused jurisdiction of the cause set forth in your petitioner's declaration, on the grounds that this court nor the state court, from which this cause was removed, did not by the filing of the petition for removal by the Commercial Publishing Company, defendant herein, and by the filing of the copy of the record in the removal herein, in this court, subject itself ipso facto to the jurisdiction of this court, as shown by the record in this cause, by overruling the demurrer of the petitioner to the plea to the jurisdiction, and by overruling the motion of the petitioner for judgment by default for failure of said Commercial Publishing Company to plead, answer or demur to the declaration within thirty days after the filing of the copy of the record on removal in this court, upon the ground that this court had no jurisdiction of the said Commercial Publishing Company in said cause, and upon said ground of the want of jurisdiction of the defendant, dismissing petitioner's said suit. Wherefore, your petitioner, J. W. Cain, considering himself aggrieved prays an order granting a writ of error from said final judgment denying the jurisdiction, as aforesaid, to the Supreme Court of the United States as authorized by section 238 of the Judicial Code, and prays this Honorable court that said writ of error be allowed solely upon said question of jurisdiction, and that

a transcript of so much of the record, proceedings and papers upon which such judgment was made as may be necessary to present said question of jurisdiction of writ of error, duly authenticated may be sent to the Supreme Court of the United States.

Your petitioner herewith files and offers bond in the penal sum of Five Hundred Dollars ($500.00) and ask- that the same be
19 approved and that the writ be allowed.

GREEN & GREEN,
Attorneys for Petitioner.

Certificate as to Jurisdiction.

The Plaintiff's suit having been dismissed by judgment of this court on the sole question that the court had no jurisdiction of the action; and the plaintiff having prayed a writ of error to the Supreme Court of the United States on said question of jurisdiction, it is now ordered, in open court, that the writ of error be allowed on that question only; and it is ordered that so much of the record and proceedings and papers upon which said judgments were made as are necessary to present the said question of jurisdiction, no more, be included in the record on appeal.

Ordered and adjudged in open court this the 18th day of November, 1918.

H. C. NILES,
District Judge.

Filed Nov. 18, 1918. L. B. Moseley, Clerk.

20 In the District Court of the United States for the Southern District of Mississippi, Jackson Division.

6643.

J. W. CAIN
vs.
COMMERCIAL PUBLISHING COMPANY.

Assignment of Errors.

Now comes the plaintiff in error, J. W. Cain, by his attorneys, and says that in the record and proceedings in the above entitled cause there is manifest error in this, to-wit:

(1) The District Court of the United States, Jackson Division, Southern District of Mississippi, erred in holding that said court had no jurisdiction to try and determine said suit, and in rendering its judgment dismissing the suit therein on that ground.

(2) The court erred in overruling the demurrer to the plea to the jurisdiction herein.

(3) The court erred in overruling the motion for judgment by default against the defendant for failure to plea or demur to the decla-

nation, after thirty days had expired from the date of the filing of the copy of the record herein; and in overruling said motion for want of jurisdiction of the defendant in said cause.

(4) The court erred in holding and deciding that the petition for removal having been filed in the state court, and which, under section 3946 Code of Mississippi of 1906 was a general entry of appearance in the state court and removing said cause upon said petition to said District Court of the United States and filing a copy of the record therein, did not, under section 29 of the Judicial Code, constitute a general entry of appearance in said suit, and require that the party so removing should plead or demur to the declaration in said cause, and that the said District Court did not have jurisdiction to try said case upon such removal, over the objection of the party so removing.

Wherefore the said J. W. Cain prays that the judgments of the said District Court of the United States, Jackson Division, Southern District of Mississippi, appealed from herein be reversed.

MARCELLUS GREEN.
GARNER WAYNE GREEN.
MARCELLUS GREEN, JR.

Filed November 18, 1913. L. B. Moseley, Clerk.

21 In the District Court of the United States for the Southern District of Mississippi, Jackson Division.

J. W. CAIN, Plaintiff in Error,
vs.
COMMERCIAL PUBLISHING COMPANY, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the Southern District of Mississippi, Greeting:

Because in the record and proceedings as also in the rendition in the judgment of a plea in the said District Court, before you, between J. W. Cain, Plaintiff in error, and the Commercial Publishing Company, defendant in error a manifest error *that* happened to the great damage *to* the said J. W. Cain, Plaintiff in error, as by his complaint appears. We, being willing that error, if any hath been done, should be duly corrected, and that speedy justice should be done to the parties aforesaid in this behalf, do command you that if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the city of Washington, District of Columbia, on the 15th day of December, 1913 in the Supreme Court of the United States to be then and there

held, that the records and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States this the 18th day of November, 1913 in the year of the Independence of the United States One hundred and thirty-seven.

L. B. MOSELEY,
Clerk of the District Court of the United States for the Southern District of Miss.

Allowed this the 18th day of November, 1913.

H. C. NILES,
District Judge.

Service of the within writ of error and the receipt of a copy is hereby acknowledged this the — day of November, 1913.

———, ———,
Attorneys for Defendant in Error.

Filed November 18, 1913. L. B. Moseley, clerk.

22 In the District Court of the United States for the Southern District of Mississippi, Jackson Division.

J. W. CAIN, Plaintiff in Error,
vs.
COMMERCIAL PUBLISHING COMPANY, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents: that we, J. W. Cain, principal and Jacob Ehrman and T. W. McAlpin, Sureties are held and firmly bound unto the Commercial Publishing Company, defendant in said suit, in the penal sum of Five Hundred Dollars ($500.00) to be paid to said party; for the payment of which well and truly to be made, we bind ourselves and each of us jointly and severally by these presents.

Sealed with our seals and dated this November 18th, 1913.

Whereas, the above named J. W. Cain has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above styled suit by the Judge of the District Court of the United States for the Jackson Division, Southern District of Mississippi.

Now, therefore, the condition of this obligation is such that if the above named J. W. Cain shall prosecute the said writ of error to effect, and answer all damages and cost if he shall fail to make such writ of error good, then this obligation shall be void, otherwise the same shall be in full force and virtue.

J. W. CAIN.
T. W. McALPIN.
JACOB EHRMAN.

The foregoing bond is approved this the 18th day of November, 1913.

H. C. NILES,
District Judge.

Filed November 18th, 1913. L. B. Moseley, Clerk.

16 In the District Court of the United States for the Southern District of Mississippi.

6643.

J. W. CAIN, Plaintiff in Error,
vs.
COMMERCIAL PUBLISHING COMPANY, Defendant in Error.

Order Specifying Papers to be Included in Record.

The above named plaintiff, having petitioned this court for a writ of error from the judgment made in this cause on the 18th day of November, 1913 dismissing his suit for want of jurisdiction, on the said question of jurisdiction only, and writ of error, having, by order of this court, been granted on said question of jurisdiction alone, now, therefore, it is hereby ordered that the following pleadings, proceedings and documents on file be included in the record on writ of error.

(1) The citation herein with the service thereof.
(2) The transcript on removal from the state court, with the clerk's certificate thereto.
(3) The Plea to the jurisdiction.
(4) The demurrer to the plea to the jurisdiction.
(5) The judgment over-ruling the demurrer to the plea to the jurisdiction, and the motion for judgment by default, and dismissing said cause.
(6) All minutes of the court, and orders made in the cause.
(7) The petition for writ of error; the order of the court granting such writ of error, and certificate as to the jurisdiction; the writ of error bond, and all orders of the court relative thereto.
(8) The certificate of the clerk as to the correctness of the record on writ of error.
(9) The endorsement of filing and acknowledgment and proof of service and other documents filed in the above mentioned cause.

Ordered and adjudged this the 18th day of November, 1913.

H. C. NILES,
District Judge.

The following endorsement appears on the back of this Order. Order specifying papers to be included in the record. Filed November 18th, 1913. L. B. Moseley, Clerk.

24 In the District Court of the United States for the Southern District of Mississippi, Jackson Division.

6643.

J. W. CAIN
vs.
COMMERCIAL PUBLISHING COMPANY.

Citation and Return.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Commercial Publishing Company of Memphis, Tennessee, and Messrs. Wright, Miles, Waring, and Walker, its Attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held in the city of Washington, District of Columbia, within thirty days from the date of this writ, pursuant to the writ of error filed in the Clerk's office of the District Court of the United States for the Jackson Division of the Southern District of Mississippi, wherein J. W. Cain is plaintiff, and you are defendant in error, to show cause, if any there be why the judgment in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States this the 18th day of November, 1913 and of the Independence of the United States — one hundred and thirty seven-.

H. C. NILES,
District Judge.

Attest:
L. B. MOSELEY, *Clerk.*

The following endorsement appears on the back of this Citation. #6643. J. W. Cain vs. Commercial Publishing Co.—Citation.—Filed November 18, 1913. L. B. Moseley, District Clerk.

25 In the District Court of the United States, Southern District of Mississippi, Jackson Division.

J. W. CAIN
vs.
COMMERCIAL PUBLISHING COMPANY.

Acknowledgment of Service.

MEMPHIS, TENN., —— —, ——.

We, Wright, Miles, Waring and Walker attorneys for the Commercial Publishing Company, do hereby acknowledge service of the

within citation on the 19th day of November, 1913 and a receipt of a copy thereof.

WRIGHT, MILES, WARING & WALKER.

Filed November 20, 1913. L. B. Moseley, Clerk.

In the District Court of the United States, Southern District of Mississippi, Jackson Division.

I, L. B. Moseley, clerk of the District Court of the United States for the Southern District of Mississippi, do hereby certify that the foregoing 25 pages contain a true and correct copy of the records in the case of J. W. Cain vs. Commercial Publishing Company, number 6643 as the same appears of record in my office at Jackson, Mississippi.

Witness my hand and seal of said court hereto affixed at Jackson in said District this the 20th day of November, 1913.

[Seal U. S. District Court, Southern District of Mississippi.]

L. B. MOSELEY, *Clerk.*

Nov. 24, 1913.

Received of Green & Green $10.00 for transcript of this record.

B. L. TODD, JR., *Stenographer.*

Endorsed on cover: File No. 23,948. S. Mississippi D. C. U. S. Term No. 797. J. W. Cain, plaintiff in error, vs. Commercial Publishing Company. Filed November 28th, 1913. File No. 23,948.

SUPREME COURT OF THE UNITED STATES

No._____

J. W. CAIN,
Plaintiff in Error.

vs.

COMMERCIAL PUBLISHING COMPANY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This case comes to this Court by Writ of Error from the District Court of the United States of the Southern District of Mississippi, Jackson Division, upon certificate of jurisdiction.

The suit was brought in the Circuit Court of Hinds County, First District, State of Mississippi, by J. W. Cain, Plaintiff in Error, a citizen and resident of Mississippi, against Commercial Publishing Company, a newspaper corporation created under the laws of Tennessee, domiciled in Memphis, Tennessee, and publishers of the *Commercial-Appeal*, a newspaper, to recover damages for libel.

The process of summons was issued by the State Court and served severally, as recited in his return, by the sheriff of Hinds County, upon two persons, A. C. Walthall and Earl Williams, as agents of Defendant in Error.

Thereupon the Defendant in Error, by its attorneys, gave the written notice required by section 29 of The Judicial Code of an intention to remove the cause to the Federal Court. Before the time at which defendant was required to plead in the State Court to the declaration, the Defendant in Error

filed, under a recited special entry of appearance for the purpose of removal, a proper petition and bond for removal in the State Court on the sole ground of diversity of citizenship. The bond was approved and the order of removal was duly made by the State Court. The Defendant in Error duly filed, on October 9, 1913, a copy of the record in said District Court of the United States, which met on November 3, 1913; and, thereupon, filed in said Federal Court a plea to the jurisdiction of the said United States District Court over the person of defendant, averring that it was a corporation created under the laws of Tennessee, and a citizen and resident of that state and not a citizen and resident of Mississippi, and that it was not doing business in the State of Mississippi, and that the persons—Walthall and Williams—upon whom service of process was had in the State Court, were not the agents of the defendant authorized to receive service of process for it.

The plaintiff demurred to this plea on the grounds:

(1.) That it sets up the insufficiency of the service of the process of summons and is not *a plea to the declaration* as is required by Section 29 of The Judicial Code, which abolishes, in removed causes, all questions as to the insufficiency of the service of process upon the person removing such cause.

(2.) That no right exists to enter a special appearance under the Laws of Mississippi, but that all appearances under the Code of 1906, of Mississippi, section 3496 (see appendix), are general, even though the process is invalidly served.

This demurrer was overruled, and issue was then taken on the plea to the jurisdiction. The plaintiff, then, after thirty days had expired after the filing of the copy of the record in the Federal Court, filed a motion for judgment by default upon the ground that the defendant removing said cause had not, within said thirty days, plead or demurred to the declaration as required by section 29 of The Judicial Code.

The Court then, by consent, heard the evidence on the issue on the said plea and was of opinion, as recited in the judgment, that neither said Walthall nor said Williams were such agents of the defendant as that process of summons against the defendant could be served on them.

Before a judgment was entered on said finding, plaintiff called up and had heard his motion for a judgment by default, which the Court overruled, and then entered judgment on the issue on the plea to the jurisdiction, and dismissed the suit for want of jurisdiction.

Thereupon, this writ of error was prayed and allowed, under section 238 of The Judicial Code, upon the sole ground of the jurisdiction of the Court, and a certificate of the District Judge to that effect was given and is made a part of the record.

ASSIGNMENT OF ERRORS.

The errors assigned are that the Court erred:

(1). In holding that it had no jurisdiction to try and determine said suit, and in rendering judgment dismissing the suit for want of jurisdiction.

(2). In overruling the demurrer to the plea to the jurisdiction.

(3). In overruling the motion for judgment by default for want of a plea or demurrer to the declaration, under section 29 of The Judicial Code.

(4). In holding and deciding that filing the petition for removal in the State Court, which, under section 3940, Code of Miss., 1906, was a general entry of appearance in the State Court, and removing said cause to the United States Court, and filing a copy of the record therein, did not, under section 29 of The Judicial Code, constitute a general entry of appearance in said suit and require the removing party to plead or demur to the declaration in said cause; and in holding and deciding that the District Court did not have jurisdiction to try such suit over the objection of the party so removing it.

POINTS.

1. This Court has jurisdiction of this Writ of Error. *The Judicial Code*, Sec. 238; *Mechanical Appliance Co. v. Castleman*, 215 U. S., 437; *Davis v. Cleveland*, 217 U. S., 157.

2. Proceedings for removal are wholly the creature of statute, and the amendment of the Removal Acts (25 *U. S. Stat.*, 433, Secs. 108, 109, 110, 1 *Desty's Fed. Pro.*, 9th Ed.) by Sections 29 and 38 of The Judicial Code, made the filing of a petition for removal a general entry of appearance, and require the party removing to plead or demur to the declaration, within thirty days after filing a copy of the record in the Federal Court; and thereby, also, a plea to the jurisdiction of the Court for want of proper service of the Writ of Summons in the State Court was abolished.

3. The words, "plead, answer or demur to the declaration or complaint" cover both common law, code and equity proceedings, and mean a plea or demurrer to the declaration, and cannot mean a plea in abatement to the service of the Writ.

4. (*a*) A plea in abatement to the jurisdiction of the Court for want of service upon the defendant is a plea in abatement to the writ and is not a plea to the declaration. *Thornton v. Fitzhugh*, 10 S. & M. (Miss.), 438; *United States v. American Bell Telephone Co.*, 29 Fed., 17; *Chamberlain v. Lake*, 36 Me., 388;

(*b*) If the defect appears upon the face of the record a motion to dismiss the suit for want of service of the writ is a proper remedy. *Wabash Ry. Co. v. Brow*, 164 U. S., 280; *Morning News v. Goldey*, 156 U. S., 518.

5. The evils of delay and expense in the proceedings in removed causes, under the former Removal Acts, had grown up, and the amendment by The Judicial Code, sections 29 and 38, was to expedite and compel a speedy hearing on the merits, and to abolish delay in removal proceedings under the practice

theretofore prevailing, whereby a party could appear, either generally or specially, in his petition to remove (*Wabash Ry. Co. v. Brow, supra*; *Morning News v. Goldey, supra*) in answer to the service of the summons, and APPARENTLY be in court and file his petition for removal on the ground of diverse citizenship, and thus defeat a speedy trial in the State Court, and then, after much delay, upon removal, defeat a trial in the United States Court on the ground that while he had appeared before the State Court and had consumed its time and expense and the exercise of its jurisdiction in his behalf, he was really not in court because not properly served with process, and then consume the time and expense and exercise of jurisdiction of the Federal Court by invoking, by motion, the Court's jurisdiction to dismiss the cause, and thus compel plaintiff to go upon a fool's errand.

6. The Statutes of Pleading, Practice and Proceedure of the State of Mississippi constitute a part of the jurisprudence of the United States Courts when not in conflict therewith, and under section 3946, Code Miss. 1906, the filing of the petition for removal in the State Court, even though a special entry of appearance, constituted a general entry of appearance, and upon removal, under sections 29 and 38 of The Judicial Code, the defendant was compelled to plead to the declaration within thirty days after the filing of the record. Sec. 914, U. S. Rev. Stats. Comp., 1901, p. 684; *Boston and M. R. R. Co. v. Gokey*, 210 U. S., 155, 162, 3.

And with the same construction as is given by the State Court. *Ia. Cent. R. R. Co. v. Hampton, etc., Co.*, 204 Fed., 966.

A special is a general entry of appearance under Section 3946, Code of 1906. *I. C. R. R. Co. v. Swanson*, 92 Miss., 485, 492.

A Texas statute of similar import as Section 3946 was held to be constitutional and its application given effect in *York v. Texas*, 137 U. S., 15.

This Texas statute conflicted with the express provisions of the Federal Statutes, especially as to the venue of the jurisdiction in the Federal Court, and the Federal Statutes were held to prevail, but only to the extent of the conflict. *Sou. Pac. Ry. Co. v. Denton*, 146 U. S., 202; *Galveston etc., Ry. Co. v. Gonsales*, 151 U. S., 496.

7. If Section 29 of The Judicial Code does not compel the removing party to plead to the declaration within said thirty days, then, under section 914, U. S. Comp. Stats, 1901, 684, "the practice, pleadings, forms and modes of proceeding" in the State Court, adopted in the Federal Court, would make the filing of the plea to the jurisdiction herein in the District Court a general entry of appearance, and would require a plea to the merits at the next term of the District Court, under Section 3946, Code 1906, supra, and it was error to dismiss the suit for want of jurisdiction.

8. The provisions of Section 38 of The Judicial Code define this statutory jurisdiction and the status of the record in the Federal Court when removed, (1) as to the jurisdiction to be exercised, and (2) as to the form of the record and status of the proceeding, by declaring, "The District Court, ... shall, in all suits removed under this chapter, proceed therein as if the suit had been originally commenced in the District Court and the same proceedings had been taken in such suit in the District Court as shall have been had therein in said State Court prior to its removal."

9. Section 38 applies to the jurisdiction of the District Court and of its record after the cause shall have been removed. It has no relevancy to the personal status of the removing party which is defined by section 29. To construe section 38 as, by implication, controlling section 29 so as to make room for pleas in abatement of the writ would, quod hoc, operate as a repeal of section 29.

10. The rule followed in *Wabash Railway Co. v. Brow*, 164 U. S., *supra*, and *Morning News v. Goldey*, 156 U. S., *supra*, obtained in states other than states in which a statute like section 2948 of the Code of 1906 prevailed, and are distinguishable because of this fact, as well as because they arose before the amendment by The Judicial Code.

BRIEF.

Analysis of Removal Acts as Amended by The Judicial Code.

The Judicial Code by section 20 amended the Removal Acts (25 U. S. Stats., 433; Secs. 108, 109, 110, 1 Desty's Fed. Proc., 9th Ed.), in these particulars:

It added these provisions:

(*a*) The party intending to remove, after the service of process—good or bad—the existence of which against him had been brought to his attention, was required, *in vacation*, to give written notice to the plaintiff in the State Court of his intention to remove the suit to the Federal Court. This written notice is a response to the service of summons, and expresses the intent to obey it, by appearance in the State Court, and by filing proceedings for a removal of the suit to the Federal Court.

Non-Compliance with the requirement is fatal to the removal to Federal Court. *Goins v. So. Pac. Co.*, 198 Fed., 432.

This requirement of written notice is incompatible with the non-existence of proper service of process, and proceeds upon the assumption that the process has been properly served. If the process was not properly served, then, as indicated by Mr. Justice Brewer in his analysis of the Texas Statute in *York v. Texas*, 137 U. S., 15, *supra*, the defendant should pay no attention to the writ.

(*b*) The amendment requires bond to be given "for his or their entering in such District Court *within*

thirty days from the filing of said petition," a copy of the record, instead of under the former act "on the first day of its then next session": Thus, the removal was to be had within thirty days, at a time when the United States District Court was not in session, and thus providing for proceedings in vacation of the Federal Court, and thereby showing that the party removing was, under the statute, to be treated as in Court, and thereby providing, also, for expedition by these proceedings *in vacation.*

When this record is filed, in vacation, within the thirty days, then:

(*c*), Section 29, provides: "the parties so removing the said cause shall, within thirty days thereafter" (*i. e.*, in vacation) "plead, answer, or demur to the declaration or complaint in said cause"; and then, section 29, concludes in the words of section 110, 1 Desty's Fed. Pro., *supra*, and "the cause shall then proceed in the same manner as if it had originally commenced in the said District (Circuit) Court."

Thus, the party removing is in court, and must, in vacation, without any order of court, or the exercise of any jurisdiction by the District Court, plead, answer or demur to the declaration, and thereby the cause, under the statute, is to be at issue for trial on the merits at the next term of the District Court. The language is *mandatory*, "shall plead, . . . or demur to the declaration"; and within the time required, namely, thirty days from the filing of the record. To interpret this statute, defining *the personal status* of the party removing and the acts to be done by him to obtain the benefit of the removal, by permitting pleas in abatement to the jurisdiction over the person by reason of invalid service of process, would be to nullify the express words of the statute, and defeat its purpose to abolish delay in hearing causes upon their merits. For example, the terms of the State Circuit Court and of the District Court are held, as a rule, every six months in Mississippi. If a suit was brought to the June term of the State

Court, and removal was had, then the removing party could file the record in the United States Court by July 1st, and, then, plead in abatement to the writ for want of service, or move to dismiss for the same reason, and this dilatory plea or motion could not be heard until the November term; and, then, if decided adversely to the removing party, he would then plead to the declaration, but at another and greater period of time than that prescribed by the statute, namely, thirty days after the filing of the record.

Section 29 having dealt with the personal status of the party removing, by section 38 the statutory proceeding is made complete by defining the status of the proceeding and the jurisdiction of the District Court when the record shall be filed and it becomes subject to the jurisdiction of the Court.

It provides for a continuation in the District Court of the proceeding just as it stood in the State Court, and for the exercise of the jurisdiction of the District Court just as if the suit had been commenced in the District Court, but this status is defined for the proceedings in the case as a removed cause.

Section 38 changes said section 110, *supra*, by enlarging its scope and making it more definite.

It provides that "in all suits removed under this chapter," that is, when a petition for removal and bond have been filed in the State Court, and an order removing it made, and the record is filed in the United States Court—when this has been done, then the District Court "shall" "proceed therein" as if the suit had been originally commenced in the District Court, and then, as to the record, that no new record or reformation of the record should be necessary, conformable to the rules of the Federal Court (this is peculiarly applicable to equity and code pleading cases), but that on the same record of the proceedings as made in the State Court, the District Court should proceed to hear the cause. In this, there is no place to base a change of section 29

requiring the party to plead to the declaration. The whole statute is harmonious and repeal by implication of the express language of section 29 cannot be ascribed to section 38.

Respectfully

MARCELLUS GREEN,
GARNER WYNN GREEN,
MARCELLUS GREEN, JR.,

Attorneys for Plaintiff in Error.

APPENDIX.

Code of Mississippi, 1906.

"3946 (3447) **Motion to quash process an appearance.**—Where the summons or citation, or the service thereof is quashed, on motion of the defendant, the case may be continued for the term, but defendant shall be deemed to have entered his appearance to the succeeding term."

The Judicial Code.

Amendment in heavy type.

"Sec. 29. Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State Court to the District Court of the United States, he may make and file a petition, duly verified, in such suit in such State Court at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the District Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such District Court, **within thirty days from the date of filing said petition,** a certified copy of the record in such suit, and for paying all costs that may be awarded by said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State Court to accept said petition and bond and proceed no further in such suit. **Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said District Court of the United**

States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

"SEC. 38. The District Court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said District Court, and the same proceedings had been taken in such suit in said District Court as shall have been had therein in said State court prior to its removal."

No. 797

IN THE

Supreme Court of the United States

J. W. CAIN, *Plaintiff in Error.*

vs.

COMMERCIAL PUBLISHING COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

LUKE E. WRIGHT,
LOVICK P. MILES,
Attorneys for Defendant in Error.

BYRON LOVETT PRINTING CO.

In the Supreme Court of the United States

J. W. CAIN, Plaintiff in Error,
vs. No. 797.
COMMERCIAL PUBLISHING COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The statement of this case made by plaintiff in error is accepted by the defendant in error. The material question involved is whether the Judicial Code precludes a non-resident defendant, who removes a suit from a State court to a Federal court, from pleading specially to the jurisdiction of the court after the removal.

BRIEF.

THE JUDICIAL CODE DOES NOT PRECLUDE DEFENDANT FROM RAISING, AFTER REMOVAL, THE QUESTION OF JURISDICTION BY SPECIAL APPEARANCE FOR THAT PURPOSE.

While it is true that Section 29 of the Judicial Code provides that "the said copy (meaning copy of the record in the State court) being entered within said thirty days, as aforesaid, in said District Court of the United States, the parties so removing the said cause shall, with-

in thirty days thereafter, plead, answer or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court," we find that Section 38 of the Judicial Code provides as follows:

> "The District Court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein *as if the suit had been originally commenced in said District Court* and the same proceedings had been taken in such suit in said District Court as shall have been had therein in said court *prior* to its removal."

If the language of Section 38, last quoted, is to be given the effect of the explicit, unambiguous language used therein, then that effect will be to cause a removal from the State court to simply lift the suit bodily from the State court into the Federal forum, preserving to both plaintiff and defendant the same rights which each would have possessed "if the suit had been originally commenced in said District Court." It was not the intent of Congress, we submit, to give a non-resident defendant any different rights where sued in the first instance in the United States court, from those of a non-resident defendant sued in the State court and thereafter removing his cause properly to the United States court.

If this suit had been originally commenced in the Federal court, and the same proceedings had been taken in this suit in the Federal District Court as had been taken in the suit prior to its removal from the State court, then the Federal court would be presented with the filing of a complaint, the issuance of a summons, an alleged service of the summons, and a return of the marshal, prior to the filing by the defendant in error

of its plea to the jurisdiction. In that situation, certainly there would be no doubt as to the right of the defendant in error to have interposed its plea to the jurisdiction.

The construction of the Judicial Code insisted upon by plaintiff in error would be not only in conflict with the express language of Section 38 of that Code, but would overrule a long established practice and destroy a great right which, by repeated decisions of the Supreme Court of the United States, has become fixed in our people.

Mechanical Appliance Co. v. Castleman, 215 U. S. 439.

Wabash West'n Ry. v. Brow, 164 U. S. 271, 278.

Goldie v. The Morning News, 156 U. S. 518.

As we understand the position of plaintiff in error, he does not contend that the Judicial Code has destroyed the right of a non-resident, who is sued, in the first instance, in the Federal Court, to raise the question of jurisdiction and have the action thereon of the trial court reviewed by the Supreme Court of the United States, *but only destroys this right as to non-resident defendants who, after being sued in the State court by plaintiffs, who alone have the right to select the initial forum, exercise their right of removal from a State court to a Federal court*, where, according to Section 38 of the Judicial Code, it is made the duty of the District Court of the United States to proceed in such cases of removal as if the suit had been originally commenced in said District Court.

There is nothing in the point that the Judicial Code should have remedied the alleged evil of delay resulting from removal and thereafter the raising of the question of jurisdiction, because this evil is generally of the plain-

tiff's own creation by failing to sue at first in the Federal court.

Prior to the Judicial Code, the right to plead to the jurisdiction of the court, and to have reversal in the Supreme Court of the United States for error in ruling upon such plea, was recognized and guarded carefully by Federal statutes. Section 1011, Revised Statutes, as corrected by Act of February 18, 1875, c. 80; Act of February 25, 1889, 25 Stat. 693, c. 236; Act of March 3, 1891, 26 Stat. 826, 827, c. 517; Court of Appeals, Act of 1891, as amended in 1897.

It has been expressly recognized *that just such plea to the jurisdiction as was filed in the instant case,* raised a question of jurisdiction reviewable by the Supreme Court of the United States.

Remington v. Central Pac. R. Co., 198 U. S. 95.

Mechanical Appliance Co. v. Castleman, 215 U. S. 440.

We find, by reading Section 238 of the Judicial Code, that Congress preserved this right, and clearly contemplated that similar questions should be raised, and the action thereon reviewed after the enactment of the Judicial Code. We find in the section mentioned the following:

> "Appeals and writs of error may be taken from the district courts, including the United States District Court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which the question of jurisdiction alone shall be certified to the Supreme Court from the court below."

This follows the language of the Act of Congress of March 3, 1891, 26 Stat. 826, 827, c. 15, supra.

The construction insisted upon by plaintiff in error, we submit, should not be sustained, unless it appears

clearly that Congress intended such revolutionary changes in procedure and jurisdiction and the destruction of such long-established practice and right. We insist that in the language, "shall within thirty days thereafter plead, answer or demur to the declaration or complaint in said cause," used in Section 29 of the Judicial Code, the word "plead" is used in its more general and comprehensive sense, meaning that the parties so removing the cause shall within thirty days from the filing of the record in the District Court, either plead to the jurisdiction or file some other plea, or he shall answer or demur to the declaration or complaint.

If we are in error in this, then certainly, without language clearly expressing such intent of Congress, it cannot he held that it was intended that the removing party should plead, answer or demur to the declaration or complaint within thirty days, unless jurisdiction had been obtained by proper service of proper process. If it had been intended by Congress that such revolutionary ends should be accomplished, the Congress would have made this intent clear by the use of available, unambiguous language. Such intent, we submit, cannot be implied. The duty to plead, answer or demur, in the sense contended for by plaintiff in error, always presupposes jurisdiction.

THE STATUTES OF MISSISSIPPI AND THE DECISIONS OF ITS COURTS ARE NOT CONCLUSIVE UPON FEDERAL COURTS IN DETERMINING WHETHER THE DEFENDANT WAS SUABLE IN THE STATE OF MISSISSIPPI, OR WHETHER EARL K. WILLIAMS OR A. C. WALTHALL WERE PERSONS UPON WHOM SERVICE OF SUMMONS COULD BE HAD, SO AS TO GIVE JURISDICTION OF THE DEFENDANT. NOR WOULD ANY STATUTE OF THE STATE OF MISSISSIPPI GIVE JURISDICTION

WHERE FACTS NECESSARY TO GIVE A FEDERAL COURT JURISDICTION DID NOT EXIST.

In support of the foregoing statement, we quote this language from *Mechanical Appliance Co. v. Castleman*, supra, wherein a plea to the jurisdiction over the person of the defendant was interposed after removal:

> "Moreover, in cases which concern the jurisdiction of the Federal courts, notwithstanding the so-called Conformity Act, Revised Statutes, Section 914, neither the statutes of the State nor the decisions of its courts are conclusive upon the Federal courts. The ultimate determination of such questions of jurisdiction is for this court alone." (Citing *Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co.*, 210 U. S. 368, 369; *Mexican Central Ry. Co. v. Pinkney*, 149 U. S. 194.)

In *Mechanical Appliance Co. v. Castleman*, the United States Circuit Judge overruled the plea to the jurisdiction interposed after the removal of the cause, on the sole ground "that the facts stated in the return of the sheriff and the summons were conclusive on the defendant, and could not be controverted by it." The Circuit Judge, in a memorandum opinion, stated that his ruling was based upon the fact that it was in accord with the law of Missouri, as held by its highest court. Upon appeal to the Supreme Court of the United States, there was reversal, and in the opinion the language first quoted herein was used.

See also *Peterson v. Chicago, Rock Island & Pacific Railway Company*, 205 U. S. 364; *Green v. C., B. & Q. Ry. Co.*, 205 U. S. 530; *Wold v. J. B. Colt Co.* (Minn.), 114 N. W. 243.

To hold that the statute of Mississippi, making a special appearance in the State court a general appearance, for the purpose of creating a duty to plead at the next

term, is controlling in the United States court after removal, would be to hold that a non-resident defendant sued in the State court would be compelled to either submit to the jurisdiction of that court, or exercise his right of removal to a Federal court at the peril of being sued there, notwithstanding in the first instance the facts necessary to give that court jurisdiction did not exist. Federal jurisdiction is dependent upon essential facts, and we know of no law that provides for the substitution of a State statute for those essential facts.

Respectfully submitted,

LUKE E. WRIGHT,
LOVICK P. MILES,
For Defendant in Error.

CAIN v. COMMERCIAL PUBLISHING COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 797. Submitted January 6, 1914.—Decided January 19, 1914.

Revolutions in the practice and efficacy of the right of removal of causes from the state to the Federal court will not lightly be presumed; and so *held* that the modification of the prior law and practice by the Judicial Code did not take from the Federal Court the power it has necessarily possessed to pass not only upon the merits of the case, but also upon the validity of the process on the question of jurisdiction over the person of the defendant.

Prior to the adoption of the Judicial Code it was settled that:

The right and the procedure of removal of causes are to be determined by the Federal law, *Goldey* v. *Morning News*, 156 U. S. 518; neither the legislature nor the judiciary of a State can limit either the right or its effect. *Id.*

The Federal court has jurisdiction according to the Constitution and laws of the United States. *Id.*

A suit must be actually pending in the state court before it can be removed; but its removal is not an admission that it was rightfully pending and that defendant can be compelled to answer. *Id.*

After removal defendant can avail in the Federal court of every reserved defense, to be pleaded in the same manner as though the action had been originally commenced in the Federal court. *Id.*

Exercising the right of removal and filing the petition does not amount to a general appearance.

These rules have not been altered by the adoption of §§ 29 and 38 of the Judicial Code.

The word "plead" in § 29 Judicial Code includes a plea to the jurisdiction.

Under the Conformity Act, § 914, Rev. Stat., a special appearance in a case removed to the Federal court from the state court of Mississippi does not become a general appearance because of the provisions to that effect in § 3946, Mississippi Code of 1906.

THE facts, which involve the construction and effect of §§ 29 and 38 of the Judicial Code, are stated in the opinion.

Mr. Marcellus Green, Mr. Garner W. Green and *Mr. Marcellus Green, Jr.*, for plaintiff in error:

This court has jurisdiction of this writ of error. Judicial Code, § 238; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437; *Davis* v. *Cleveland*, 217 U. S. 157.

Proceedings for removal are wholly the creature of statute, and the amendment of the Removal Acts (25 Stat. 433, §§ 108, 109, 110, 1 Desty's Fed. Pro., 9th ed.) by §§ 29, 38, Judicial Code, made the filing of a petition for removal a general entry of appearance, and require the party removing to plead or demur to the declaration, within thirty days after filing a copy of the record in the Federal court; and thereby, also, a plea to the jurisdiction of the court for want of proper service of the writ of summons in the state court was abolished.

The words, "plead, answer or demur to the declaration" cover both common law, code and equity proceedings, and mean a plea or demurrer to the declaration, and not one in abatement to the service of the writ.

A plea in abatement to the jurisdiction for want of service is a plea to the writ and not one to the declaration. *Thornton* v. *Fitzhugh*, 10 S. & M. (Miss.) 438; *United States* v. *Bell Tel. Co.*, 29 Fed. Rep. 17; *Chamberlain* v. *Lake*, 36 Maine, 388.

If the defect appears upon the face of the record a motion to dismiss the suit for want of service of the writ is a proper remedy. *Wabash Ry. Co.* v. *Brow*, 164 U. S. 280; *Goldey* v. *Morning News*, 156 U. S. 518.

The evils of delay and expense in the proceedings in removed causes, under the former Removal Acts, had grown up, and the amendment by Judicial Code, §§ 29, 38, was to expedite and compel a speedy hearing on the merits, and to abolish delay in removal proceedings under the practice theretofore prevailing, whereby a party could appear, either generally or specially, in his petition to remove (*Wabash Ry. Co.* v. *Brow, supra; Goldey* v. *Morning*

News, supra) in answer to the service of the summons, and apparently be in court and file his petition for removal on the ground of diverse citizenship, and thus defeat a speedy trial in the state court and then, after much delay, upon removal, defeat a trial in the United States court on the ground that the special appearance did not give jurisdiction.

The Statutes of Pleading, Practice and Procedure of Mississippi constitute a part of the jurisprudence of the United States courts when not in conflict therewith, and under § 3946, Code Miss. 1906, the filing of the petition for removal in the state court, even though a special entry of appearance, constituted a general entry of appearance, and upon removal, under §§ 29, 38 of Judicial Code, the defendant was compelled to plead to the declaration within thirty days after the filing of the record. Section 914, Rev. Stats.; *Boston & M. R. R. Co.* v. *Gokey*, 210 U. S. 155, 162; *Ia. Cent. R. R. Co.* v. *Hampton &c. Co.*, 204 Fed. Rep. 966.

A special is a general entry of appearance under § 3946, Code of 1906. *I. C. R. R. Co.* v. *Swanson*, 92 Mississippi, 485, 492. See also *York* v. *Texas*, 137 U. S. 15.

This Texas statute conflicted with the express provisions of the Federal statutes, especially as to the venue of the jurisdiction in the Federal court, and the Federal statutes were held to prevail, but only to the extent of the conflict. *Sou. Pac. Ry. Co.* v. *Denton*, 146 U. S. 202; *Galveston &c. Ry. Co.* v. *Gonzales*, 151 U. S. 496.

The rule followed in *Wabash Railway Co.* v. *Brow*, 164 U. S. *supra*, and *Goldey* v. *Morning News*, 156 U. S. *supra*, obtained in States other than those in which a statute like § 3946 of the Code of 1906 prevailed, and are distinguishable because of this fact, as well as because they arose before the amendment by the Judicial Code.

Mr. Luke E. Wright, Mr. Lovick P. Miles, Mr. Roane Waring and *Mr. Sam. P. Walker* for defendant in error:

The construction of the Judicial Code insisted upon by plaintiff in error would not only be in conflict with the express language of § 38 of that Code, but would overrule a long established practice and destroy a great right which, by repeated decisions of the Supreme Court of the United States, has become fixed in our people. *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 439; *Wabash West'n Ry.* v. *Brow*, 164 U. S. 271, 278; *Goldey* v. *Morning News*, 156 U. S. 518.

Prior to the Judicial Code, the right to plead to the jurisdiction of the court, and to have reversal in the Supreme Court of the United States for error in ruling upon such plea, was recognized and guarded carefully by Federal statutes. Sections 1011, Revised Statutes, as corrected by act of February 18, 1875, c. 80; act of February 25, 1889, 25 Stat. 693, c. 236; act of March 3, 1891, 26 Stat. 826, 827, c. 517; Court of Appeals Act of 1891, as amended in 1897.

It has been expressly recognized that just such plea to the jurisdiction as was filed in the instant case, raised a question of jurisdiction reviewable by the Supreme Court of the United States. *Remington* v. *Central Pac. R. Co.*, 198 U. S. 95; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 440.

The statutes of Mississippi and the decisions of its courts are not conclusive upon Federal courts in determining whether the defendant was suable in the State of Mississippi, or whether the parties served were persons upon whom service of summons could be had, so as to give jurisdiction of the defendant. Nor would any statute of Mississippi give jurisdiction where facts necessary to give a Federal court jurisdiction did not exist. *Mechanical Appliance Co.* v. *Castleman, supra.* See also *Peterson* v. *Chicago, R. I. & Pac. Ry. Co.*, 205 U. S. 364; *Green* v. *C., B. & Q. Ry. Co.*, 205 U. S. 530; *Wold* v. *Colt Co.*, 114 N. W. Rep. (Minn.) 243.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for libel brought in the Circuit Court of Hinds County, First District, State of Mississippi. Plaintiff in error, as he was plaintiff in the action we will so refer to him, alleged himself to be a citizen of the State of Mississippi, that defendant in error, Commercial Publishing Company, referred to herein as defendant, published a libel against him in its "newspaper called the Commercial Appeal in the City of Memphis, State of Tennessee, but that the said Commercial Appeal has a large circulation throughout the State of Mississippi and all adjoining States and among foreign cities and also in foreign countries." $10,000 actual damages were prayed and $10,000 punitive damages.

Summons was issued and returned served by the sheriff of the county, as: "Executed personally on the Commercial Publishing Company" by delivering a copy to E. K. Williams, described as "its agent, at Jackson, Miss.," and to A. C. Walthall, described as "its correspondent, at Jackson, Mississippi."

Defendant filed a petition for removal of the action to the District Court of the United States, which petition stated the nature of the action, that plaintiff was a resident and citizen of Mississippi, that defendant was a corporation chartered under and by virtue of the laws of Tennessee, that the time for answering or pleading to the declaration had not expired, that defendant had not appeared therein and that defendant appeared only specially and for the sole purpose of requesting the removal of the cause to the District Court of the United States, and that it did not waive any objections or exceptions to the jurisdiction. A bond as required by law was duly given, which was approved, and an order of removal was duly made. The copy of the record was duly filed in the

District Court of the United States. The defendant then filed in the latter court a plea to the jurisdiction over the person of defendant, appearing specially for that purpose. The plea alleged that the state court had not acquired jurisdiction of the defendant, because (a) it was a corporation of the State of Tennessee, and that it had never taken out a license to do business in Mississippi, nor, at the time of the service of the summons, did it have an agent, office or place of business in Hinds County, State of Mississippi; (b) the persons upon whom service was made were neither agents nor officers of, nor in any relation to, defendant for the reason that defendant was not doing business in the State of Mississippi.

Plaintiff demurred to the plea, stating as grounds (1) that it was directed to the service of process and not to the declaration as required under § 29 of the Judicial Code; (2) no right exists to enter a special appearance in the Hinds County Circuit Court under the laws of the State of Mississippi, all appearances being general, even though process be invalidly served.

The demurrer was overruled and issue joined on the plea to the jurisdiction, and the court having heard the evidence decided that neither of the persons upon whom summons was served was such an agent of defendant that service upon him would give jurisdiction over the person of defendant, and thereupon found the issue for defendant.

Before judgment was entered plaintiff called up his motion for judgment for default because defendant had not pleaded or demurred to the declaration within thirty days after the filing of the copy of the record of removal as required by § 29 of the Judicial Code. The motion was overruled, the court reciting in its order that it was of "opinion that defendant was not required to plead or demur to the declaration unless the process of summons in the state court was duly served upon an agent of defend-

ant upon whom service of process was authorized to be made."

Judgment was then entered quashing the service of process and dismissing the action "without prejudice to the right of plaintiff to sue upon the causes of action set up in the declaration."

Plaintiff prayed a writ of error to this court upon the question of jurisdiction. It was allowed in open court, the court reciting that it was allowed on the question of jurisdiction only, the court having dismissed the action "on the sole question that the court had no jurisdiction of the action."

The question in the case is the simple one of what is the effect of §§ 29 and 38 of the Judicial Code. Section 29 provides for the filing of a petition for the removal of a suit from a state court to the District Court of the United States at any time before the defendant is required by the laws of the State to answer or plead, and the filing therewith of a bond for "entering in such District Court, within thirty days from the date of filing said petition, a certified copy of the record in such suit." It provides that, this being done, the state court shall accept the petition and bond and "proceed no further in such suit." It provides further that notice of the petition and bond shall be given to the adverse party and that "the said copy being entered within said thirty days as aforesaid in said District Court of the United States, the parties so removing the said cause shall within thirty days thereafter plead, answer or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

Section 38 provides that the District Court in suits so removed shall "proceed therein as if the suit had been originally commenced in said District Court, and the same proceedings had been taken in such suit in said

District Court as shall have been had therein in said state court prior to its removal."

The argument is that these sections abolish the practice declared in *Goldey* v. *Morning News*, 156 U. S. 518, and *Wabash Railway Co.* v. *Brow*, 164 U. S. 271. In the former case the following propositions were laid down: (1) The right and procedure of removal of actions from a state court are to be determined by the Federal law. (2) The legislature or the judiciary of a State can neither defeat the right nor limit its effect. (3) The act of Congress by which the practice, pleadings, and forms and modes of proceeding in actions at law in the courts of the United States are required to conform as near as may be to those existing in the state courts applies only to cases of which the court has jurisdiction according to the Constitution and laws of the United States. (4) A suit must be actually pending in a state court before it can be removed, but its removal to the court of the United States does not admit that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein; but enables the defendant to avail himself in the United States court of any and every defense duly and seasonably reserved and pleaded to the action (p. 524) "'in the same manner as if it had been originally commenced in said circuit court.'" The words quoted, it will be observed, are repeated in § 29, "District Court" being substituted for "Circuit Court."

In *Wabash Railway Co.* v. *Brow*, 164 U. S. 271, 279, it is said, "By the exercise of the right of removal, the petitioner refuses to permit the state court to deal with the case in any way, because he prefers another forum to which the law gives him the right to resort. This may be said to challenge the jurisdiction of the state court, in the sense of declining to submit to it, and not necessarily otherwise.

"We are of opinion that the filing of a petition for

removal does not amount to a general appearance, but to a special appearance only."

Subsequent cases have applied this ruling. *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437, and cases cited therein.

It is contended, however, as we have seen, that §§ 29 and 38 of the Judicial Code have instituted a new and more expeditious practice. This is deduced from that part of § 29 which provides that the party desiring to remove a case shall make and file with his petition a bond for entering in the District Court within thirty days from the date of filing his petition a certified copy of the record, written notice thereof to be given the adverse party, and the copy of the record being so entered, "*the parties so removing the said cause shall, within thirty days thereafter, plead, answer or demur to the declaration or complaint in said cause.* . . ."

The purpose of these provisions, which are an amendment to the prior law, it is contended, is to expedite trials and preclude a defendant from preventing a speedy trial in the state court by removal proceedings and "then consume the time and expense and exercise of jurisdiction of the Federal court by invoking, by motion, the court's jurisdiction to dismiss the cause, and thus compel plaintiff to go upon a fool's errand." To prevent this consequence, it is further insisted, the record was required to be filed within thirty days from the date of filing the petition for removal, which, necessarily, it is said, would be in vacation, and that therefore the requirement that within thirty days after it is filed the defendant "shall plead, answer or demur to the declaration or complaint in said cause" necessarily means "a plea or demurrer to the declaration and cannot mean a plea in abatement to the service of the Writ."

It may be conceded that the purpose of the amendment was to secure expedition in the disposition of the

case, but a revolution in the practice and efficacy of the right of removal is not lightly to be inferred. And a revolution it would be. It would take from the Federal courts the power they have possessed under the cases cited, a power not only to pass upon the merits of the case but upon the validity of the service of process, that is, upon the question of jurisdiction over the person of the defendant. How essential this power is to the right of removal is obvious. Without it a State could prescribe any process or notice or a plaintiff, as in the pending case, serve process on a person having no relation with a defendant and compel him to submit to it and to a jurisdiction not of his residence, or give up his right to take the case to what in contemplation of law may be a more impartial tribunal for the determination of the action instituted against him and which it is the purpose of the removal proceedings to secure to him, and, it must be assumed, completely, not by surrender of any of his rights but in protection and security of all of them.

The weakness of plaintiff's contention is demonstrated not only when we consider all of the language of § 29, but the language of § 38, which provides that in all suits removed the District Court shall proceed therein as if the suit had been originally commenced in the District Court, "and the same proceedings had been taken in such suit in said District Court as shall have been had therein in said state court prior to its removal." In other words, the cause is transferred to the District Court as it stands in the state court and the defendant is enabled to avail himself in the latter court of any defenses and, within the time designated, plead to the action "in the same manner as if it had been originally commenced in said District Court." And these words, we have seen, were explicitly given such effect in the cited cases.

It is clear, therefore, that plaintiff gives too restrictive a meaning to the word "plead" in § 29. It must be con-

strued to include a plea to the jurisdiction, and, so construing it, all of the provisions for removal of causes become accordant and their purposes fulfilled—the right of a speedy disposition of the suit to the plaintiff and the right of the defendant to have all questions determined by the Federal tribunal.

Plaintiff further contends that under the Mississippi Code the filing of the petition for removal constitutes a general entry of appearance, that therefore, if § 29 does not compel the removing party to plead to the declaration within thirty days, "then, under § 914, Rev. Stat.; U. S. Comp. Stat. of 1901, p. 684, the 'practice, pleadings, forms and modes of proceeding' in the state court, adopted in the Federal court, would make the plea to the jurisdiction here in the District Court a general entry of appearance and would require a plea to the merits at the next term of the District Court under the Code of the State," because "a special is a general entry of appearance under § 3946, Code of 1906."

The contention is untenable. *Goldey* v. *Morning News*, and *Mechanical Appliance Co.* v. *Castleman*, *supra*.

Judgment affirmed.